No. 56474-2-II

IN THE WASHINGTON STATE COURT OF APPEALS, DIVISION II

Ronald J. Kraus
Appellant,

vs.

Washington State Patrol
Respondent.

Appellant's Reply Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT

A. Mr. Kraus exhausted his administrative remedies.

WSP argues that Mr. Kraus is not entitled to relief under the Equal Access to Justice Act (EAJA) because he failed to exhaust his administrative remedies. Response at 8. To support this claim, WSP tries a "loophole" approach, arguing that Mr. Kraus's counsel did not use magic language to explicitly request a correction of his record. However, RCW 43.43.730 does not specify any procedure or magic language that must be used to request correction of a record. The email exchange about demonstrates that WSP knew exactly what Mr. Kraus was inquiring about and requesting. This is especially clear when considering the email exchange counsel had about Mr. Doe's case just a few weeks prior. The response brief goes on to state that WSP "was clearly open to correction, having invited Kraus to submit additional information." Response at 12. How can WSP argue that Mr. Kraus did not request a correction, while conceding that it was "clearly open to

correction"? This is disingenuous. Context matters, and context proves that WSP knew Mr. Kraus was requesting correction of his record.

The response brief also states that the record that led WSP to correct its reporting "was available to either party through the Criminal Records Privacy Act or the Public Records Act," and that if Mr. Kraus had sought administrative review, "it is likely that his matter would have been resolved at the administrative level." Except the record proves without doubt that Mr. Kraus sought correction of his record and WSP's response wasn't "let us look into this and we'll get back to you," it was "no, this is our policy and we're not changing anything." If the record is available to both parties, why does WSP get to place the burden on Mr. Kraus? RCW 43.43.730 does not place the burden on the party requesting correction. In fact, the opposite - RCW 43.43 generally places the burden on WSP to maintain and report accurate records.

Mr. Kraus sought correction of his record by asking WSP to stop interpreting dismissed dispositions as convictions and WSP refused. Nothing more was required of him.

Finally, given the totality of the circumstances, further attempts to resolve the issue administratively with WSP would have been futile given WSP's repeated adherence to its untenable policy.

B. The EAJA applies to *de novo* review.

At the outset, WSP argues that "[t]rial court decisions regarding application of the EAJA are reviewed for abuse of discretion," citing *Raven v. Dep't of Soc. & Health Servs.*, 177 Wn.2d 804, 832, 306 P.3d 920 (2013). Response at 13. This is a misleading standard of review. "A trial court's *award of attorney fees* under the EAJA is reviewed for abuse of discretion." *Raven*, 177 Wn.2d at 832 (emphasis added). But, the threshold question of whether the EAJA even applies to review under RCW 43.43.730 is one of law, and is reviewed -

appropriately - *de novo*. *Curtin v. City of E. Wenatchee,* 12 Wn. App. 2d 218, 222, 457 P.3d 470 (2020).

In support of its argument that the EAJA does not apply to review under RCW 43.43.730, WSP relies heavily on *Cobra Roofing v. Labor & Indus.*, 157 Wn.2d 90, 135 P.3d 913 (2006). Response at 14-20. *Cobra Roofing* is inapposite. There, the Washington Supreme Court held that review of a WISHA violation by the Department of Labor and Industries did not come within the ambit of judicial review of an agency action under the APA. This holding stemmed from the language in RCW 34.05.030(2)(a) and (2)(c), exempting "adjudicative proceedings of the Board of Industrial Insurance Appeals or to the Department of Labor and Industries where another statute expressly provides for review of adjudicative proceedings." *Cobra Roofing*, 157 Wn.2d at 99. Given the categorical nature of these exemptions, there was little left for the supreme court to decide.

However, RCW 34.05.030(2)(g) states that review under RCW 43.43 is exempted only "[t]o the extent [the APA is] inconsistent with any provisions of chapter 43.43. RCW." The APA and RCW 43.43.730 are not inconsistent, as explained in the opening brief. If the legislature had intended to categorically exempt RCW 43.43.730 review from the APA, it could have done so without qualifying the exemption as it did. It could have worded the exemption like it worded (2)(c) - by applying the exemption if another statute expressly provided for such review. In that case, the existence of RCW 43.43.730 would trigger the exemption. But, the legislature chose not to do that.

Thus, the exemption in (2)(g) is not the same as the exemptions in (2)(a) and (2)(c), rendering the holding in *Cobra Roofing* inapplicable. Applying the supreme court's interpretations of (2)(a) and (2)(c) to (2)(g) where the statutory language of (2)(g) differs significantly would violate principles of statutory construction.

C. Mr. Kraus is the prevailing party.

WSP argues that Mr. Kraus cannot be the prevailing party "under well-established Washington precedent," but then fails to cite a single published case that has considered and rejected the catalyst theory. Response at 21. To buttress its argument, WSP cites *Parmelee v. O'Neel*, 168 Wn.2d 515, 229 P.3d 723 (2010) for the proposition that "a plaintiff prevails when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." Response at 22.

Mr. Kraus meets this standard. His complaint for *de novo* review against WSP induced WSP to change its behavior to directly benefit him. He received actual relief on the merits of his claim and that relief materially altered the relationship between him and WSP. The only difference is that he received the relief directly from WSP and not the court. But no

Washington state holding requires that the relief come directly from the court.

WSP also relies on an unpublished opinion in *Besola v. Dep't of Health*, 2016 Wash. App. LEXIS 121 (2016). Response at 23. *Besola* is distinguishable for two reasons. Appellant's case was mooted not because of voluntary action taken by the Board of Veterinary Governors in response to the appeal of his license suspension, but because of an intervening decision by the Washington Supreme Court to overturn his criminal conviction. Thus, he received relief that was not tied to the filing of the appeal and he would have received that relief even if he had not filed the appeal. That is significantly different than the situation here, where Mr. Kraus did not and would not have received any relief until he filed his complaint for *de novo* review.

Second, it appears that the appellant in *Besola* did not argue application of the catalyst theory because the court's unpublished opinion did not cite or discuss any such argument.

Thus, to date, no Washington court has properly considered and rejected the catalyst theory in a published opinion. As such, it cannot be said that the catalyst theory does not apply in Washington state. This Court should take this opportunity to adopt the catalyst theory as an important extension of the EAJA to protect individuals from the abuses of state actors.

WSP also argues that it was the Kitsap County Prosecutor that was the catalyst for change, and not Mr. Kraus's complaint for *de novo* review. Response at 26. But Mr. Kraus first alerted WSP to the issue in November 2020 and the change to his record did not occur until April 2021, three months after serving the complaint on the Attorney General in January 2021. WSP's investigation only occurred because of the complaint. The record is clear about that. "[A] civil action is commenced by service of a copy of a summons together with a copy of a complaint, as provided in rule 4 *or* by filing a complaint." CR 3 (emphasis added). The matter had commenced via service in January 2021, months before WSP took any corrective action.

The argument that anything other than Mr. Kraus's complaint was a catalyst for change is demonstrably false.

D. WSP's actions were not substantially justified.

WSP doubles down on its argument that its role is "limited and custodial in nature." Response at 29. Yet, as explained more thoroughly in the opening brief, WSP did not report the disposition received by the court. WSP applied its own flawed interpretation to the disposition, and then reported what it wanted to report. If it truly viewed its rule as custodial in nature, it would have reported "dismissed," and that's it. Instead, it reported the disposition as "guilty."

WSP also argues that its actions don't have to be correct, only reasonable. Response at 30-31. While that is a correct statement of the law, it is inconceivable that reporting the disposition of a charge as "guilty" when the court reported "dismissed" could ever be reasonable.

CONCLUSION

Based on the foregoing, this Court should reverse the trial court's denial of Mr. Kraus's motion for attorney fees and costs and remand.

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Respectfully submitted,

Vitaliy Kertchen #45183
Date: 7/4/22

DECLARATION OF SERVICE

I, Vitaliy Kertchen, being of sound age and mind, declare that on 7/4/22, I served this document on the Washington State Patrol and Attorney General by uploading it using the Court's e-filing application and emailing a copy of the document using that process to all registered users.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Respectfully submitted,

Vitaliy Kertchen #45183
Date: 7/4/22
Place: Lakebay, WA

KERTCHEN LAW, PLLC

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